MALAYAN BANKING BHD

v.

RICHARD LEE EE KEN

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[BANKRUPTCY NO: 29-1150-1996]
23 JANUARY 1998

BANKRUPTCY: *Petition - Bankruptcy notice - Challenge to validity of - Application to be made by motion supported by affidavit - Rule 18 Bankruptcy Rules 1969 - Application by way of summons in chambers - Whether bad in law - Whether fatally flawed - Bankruptcy Act 1967, s. 3 - Bankruptcy Rules 1969, rr. 18, 95*

BANKRUPTCY: *Petition - Bankruptcy notice - Striking out - Whether judgment irregularly obtained - Whether Bankruptcy Court has power to go behind a judgment and inquire into validity of judgment debt - Bankruptcy Act 1967, s. 3 - Rules of the High Court 1980, O. 42 r. 12*

In 1984, before the High Court at Kota Kinabalu, the petitioning creditor had obtained a judgment in default against the judgment debtor. The judgment debtor did not take any step to set aside the judgment, and in 1996 the petitioning creditor commenced bankruptcy proceedings against the judgment debtor. In 1997, the judgment debtor, in a move to set aside the creditor's petition pursuant to r. 18(1) of the Bankruptcy Rules 1969, filed a summons-in-chambers application for that purpose at the High Court, Johor Bahru ('encl. 17'). *Inter alia*, the summons-in-chambers application sought to challenge the judgment debt in question, including the interest awarded thereto by the Kota Kinabalu High Court. Be that as it may, the application to set aside was dismissed by the learned SAR, whereupon the judgment debtor appealed. Before the learned judge, the petitioning creditor, by way of preliminary objections, raised three issues, namely (i) whether the procedure adopted by the judgment debtor was correct (ii) whether the court could go behind the judgment so as to inquire into its validity; and (iii) whether the appeal ought to be dismissed on ground of lack of *bonafide* on the judgment debtor's part.

Held:

[1] The correct procedure to stay and set aside the creditor's petition is to file a motion supported by an affidavit as provided in r. 18 of the Bankruptcy Rules 1969 ('the BR'), and not by way of a summons-in-chambers. The procedural defect in encl. 17 herein cuts into the very rubric of the judgment debtor's right of challenge.

[2] A bankruptcy court can go behind the judgment of another court when that judgment was obtained by fraud or collusion or there had been some miscarriage of justice. The judgment in default of appearance carried with it an interest rate which was higher than that allowed under O. 42 r. 12 of the Rules of the High Court 1980 ('the RHC') but there was no allegation of fraud or collusion.

[2a] Be that as it may, weighing "the ends of justice" judicially, the petitioning creditor ought to be entitled to use the judgment from the High Court at Kota Kinabalu to found bankruptcy proceedings against the judgment debtor notwithstanding that the interest after judgment that was awarded was more than it should be. The excess amount must be reduced accordingly if and when a receiving and adjudication order is made.

[3] No steps were taken by the judgment debtor to set aside the judgment notwithstanding that the same was handed down by the court some 14 years ago. The judgment debtor also did not take any action after the bankruptcy notice was served on him, and only initiated his first move on 15 April 1997 when he filed the notice of intention to oppose the petition. This being the case, the filing of encl. 17 on 27 August 1997 smacked of lack of *bona fide* on the part of the judgment debtor.

[Preliminary objections upheld; appeal dismissed.]

Case(s) referred to:
Anlaby v. Praetorius [1888] 20 QBD 764 ***(refd)***
Armitage v. Parsons [1908] 2 KB 410 ***(refd)***
D & C Bank Bhd v. Datuk Ong Kian Seng [1995] 3 CLJ 307 ***(foll)***
Grech v. Board of Trade [1923] WN 235 ***(cit)***
Hughes v. Justin [1894] 1 QB 667 ***(refd)***
Muir v. Jenks & Co [1913] 2 KB 412 CA ***(refd)***
Re Flatau, ex p Scotch Whisky Distillers Ltd [1889] 22 QBD 83 ***(foll)***
Re Lennox, ex p Lennox [1885] 16 QBD 315 ***(foll)***
Re Mat Sari Hamid, ex p United Asian Bank Bhd [1993] 1 CLJ 202 ***(aff)***
Soh Bok Yew v. Cindee Dev Sdn Bhd [1977] 1 MLJ 242 ***(cit)***
Sovereign General Insurance Sdn Bhd v. Koh Tian Bee [1988] 1 CLJ 155 ***(foll)***
Supreme Finance (M) Bhd v. Koo Sin Ken [1987] 1 CLJ 374 ***(cit)***
Wee Choo Keong v. MBF Holdings Bhd & Anor [1993] 3 CLJ 210 ***(aff)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i), (2)
Bankruptcy Rules 1969, rr. 8(1), 18, 95, 117
Rules of the High Court 1980, O. 20 r. 11, O. 42 r. 12, O. 45 rr. 3, 4(2)(a), O. 46 r. 2(1)(a)

For the petitioning creditor- Mohd Najib Omar; M/s Abdullah A Rahman & Co
For the judgment debtor - T Rajasekaran; M/s Saga, Raja & Kumar

Reported by WA Sharif

JUDGMENT

Abdul Malik Ishak J:

Before the High Court, Kota Kinabalu, Sabah, Malayan Banking Berhad ("the petitioning creditor") obtained a judgment in default of appearance against Richard Lee Ee Ken ("the judgment debtor"). This was on 29 September 1984 and the order of that High Court was worded thus:

JUDGEMENT IN DEFAULT OF APPEARANCE

> NO APPEARANCE has been entered by the Defendant. IT IS THIS DAY ADJUDGED that the defendant do pay the Plaintiff the sum of $28,733.23 plus agreed interest at 1 1/2% per mensem per annum from the 1st of July till date of payment, late charges of $5.00 per month and agreed legal fees of $2,873.00 and costs of $225.00.
>
> Dated the 29th day of September 1984.
>
> Sgd (Illegible)
> SENIOR ASSISTANT REGISTRAR
> HIGH COURT IN BORNEO

On 19 August 1992 the petitioning creditor obtained an order from the senior assistant registrar ("SAR"), High Court, Kota Kinabalu, Sabah to issue execution against the judgment debtor notwithstanding that six years had lapsed and this must have been in the nature of the requisite leave as prescribed by O. 46 r. 2 (1)(a) of the Rules of the High Court 1980 ("RHC"). The order of the SAR was worded thus:

ORDER

> **UPON THE APPLICATION** of MALAYAN BANKING BERHAD the Judgment Creditor, AND **UPON READING** the Affidavits of NG THIAN WATT ESQ. sworn to on the 21st day of May, 1992 and filed herein and **UPON HEARING** LEE HAI FUNG ESQ. of Counsel for the Plaintiff/ Judgment Creditor **IT IS ORDER (ED)** that the Plaintiff/Judgment Creditor be at liberty to issue execution against the Defendant/Judgment Debtor on the Judgment herein dated 29th September, 1984 notwithstanding that 6 years have lapsed since the date of such Judgment and that the Defendant/Judgment Debtor do pay the costs of and occasioned by this application.
>
> Dated this 19th day of August 1992.

By the Court,

Sgd (Illegible)
SENIOR ASSISTANT REGISTRAR
HIGH COURT IN BORNEO

Order 46 r. 2(1)(a) of the RHC reads as follows:

> (1) A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases, that is to say:
>
> (a) where six years or more have lapsed since the date of the judgment or order.

and in my judgment the requirement of leave to issue execution under this rule applies to all writs of execution and is additional to the requirement of leave to issue particular writs of execution under other rules, for examples, O. 45 r. 3 of the RHC (writ of possession) and O. 45 r. 4(2)(a) of the RHC (writ of delivery to recover the property or its assessed value). As a matter of course, leave will be given in a clear case (*Grech v. Board of Trade* [1923] WN 235).

Reverting back to the mainstream of the case, the request for the issue of the bankruptcy notice in encl. 2 was dated 19 July 1996 and it was filed on 20 July 1996 and there it briefly sets out the current address of the judgment debtor for the greater part of the past one year and it enclosed an office copy of the order of the High Court, Kota Kinabalu, Sabah as reproduced above. Of pertinence, it stated that the execution of the said judgment has not been stayed.

The bankruptcy notice dated 20 July 1996 in encl. 3 was filed on the same date and the amount of debt incurred by the judgment debtor was quantified as follows:

Judgment sum	...	RM28,733.23
Add: Interest at 1.5% per month from 1.7.84 to 29.9.90 (2282 days)	...	RM32,335.51
Late charges at RM5.00 per month from July 1984 to July 1990 (75 months)	...	RM 375.00
Legal Fees	...	RM 2,873.00
Costs of action	...	RM 225.00
		RM64,541.74

The bankruptcy notice was duly served on the judgment debtor on 22 September 1996 at 4.30pm at his postal address in Johor Bahru. An affidavit of service in encl. 5 was duly deposed by the process server and it enclosed a copy of the request for issue of the bankruptcy notice and a copy of the bankruptcy notice itself.

The petitioning creditor filed a creditor's petition in encl. 7 which was dated 9 November 1996 and the date of filing was 20 December 1996. The creditor's petition was worded thus:

1. That the said debtor is domiciled in the Federation or in any State or within one year before the date of the presentation of the petition has ordinarily resided or had a dwelling house or place of business in the Federation or has carried on business in the Federation personally or by means of an agent or is or has been within the same period a member of a firm or partnership which has carried on business in the Federation by means of a partner or an agent or manager.

2. That the said RICHARD LEE EE KEN is justly and truly indebted to us in the aggregate in the sum of RM64,541.74 as per schedule annexed hereto being the amount due on a judgment obtained by the Judgment Creditor against the said debtor in the Kota Kinabalu High Court Suit No.K 393 of 1984 on 29th September, 1984.

3. That we do not, nor does any person on our behalf hold any security on the said debtor's estate, or on any part hereof, for the payment of the said sum.

4. That the said RICHARD LEE EE KEN within six months before the date of the presentation of this petition has committed the following act of bankruptcy, namely that he failed to comply with the requirements of the Bankruptcy Notice dated 20th July, 1996 which was personally served on him at No. 7, Jalan Penyiaran 27, Taman Universiti, 81300 Skudai, Johor on 22nd September, 1996. Therefore the act of Bankruptcy was committed on him on 1st October, 1996.

The judgment debtor wasted no time and he filed on 15 April 1997 a "Notice By Debtor Of Intention To Oppose Petition" as reflected in encl. 21 which was dated 14 April 1997. It was couched in a straightforward manner, in these words:

NOTICE BY DEBTOR OF INTENTION TO OPPOSE PETITION

In the matter of a Bankruptcy Petition presented against me, RICHARD LEE EE KEN, of No. 7, Jalan Penyiaran 27, Taman Universiti, 81300 Skudai, Johor Bahru, Johor Darul Takzim on the 9th of May, 1997 by Malayan Banking Berhad of 7th Floor, Menara Maybank, 100 Jalan Tun Perak, 50050 Kuala Lumpur.

I, the above, RICHARD LEE EE KEN, do hereby give you notice that I intend to oppose the receiving order as prayed and that I intend to dispute the Petitioning Creditor's debt and act of bankruptcy.

Enclosure 21 was supported by an affidavit in encl. 19 styled as an "affidavit in support to oppose the petition" which was affirmed by the judgment debtor himself on 19 June 1997 and was filed on 21 June 1997. Paragraphs 2, 3, 4, 5 and 6 of encl. 19 were worded as follows:

2. I wish to apply to this Honourable Court for leave to refer to my Notice of Intention to Oppose the Petition dated on the 14th of April, 1997; the Petitioner's Bankruptcy Notice dated on the 20th of June, 1996 and to the Creditor's Petition (Enclosure No:7) dated on the 9th of November, 1996 and would like to state that the alleged Judgment Debt amounting to Ringgit Malaysia Sixty Four Thousand Five Hundred Fourty One and sen Seventy Four (RM64,541.74) only was wrongfully calculated. This is because the interest rate calculated on the Petitioner's Judgment In Default which was obtained on the 29th of September, 1984 against me was calculated at an interest rate of 1.5% per month per annum from the 1st of July, 1984 until the 29th of September, 1990 whereas the then applicable Order 42 rule 12 of the Rules of the High Court, 1980 (before it's amendment on the 12th of December, 1986) only allowed for the maximum rate of 8% per annum from the date of judgment until the date of satisfaction. I enclose herewith a copy of the Judgment In Default and a copy of the Bankruptcy Notice as exhibits marked as "R-1" and "R-2" respectively.

3. Furthermore, it is also my contention that the interest amount of 1.5% per month per annum which was calculated by the Petitioner on the Judgment In Default (as exhibited herein as "R-1") was wrongfully calculated from the 1st of July, 1984 as stated in the Petitioner's Bankruptcy Notice (as exhibited herein as "R-2") because the Judgment In Default was obtained only on the 29th of September, 1984. I had through my solicitors tried to obtain a copy of the Summons and the Statement of Claim from the Petitioner's solicitors to verify this matter but was informed by the said solicitors that they do not have a copy of the same. I enclose herewith copies of a letter dated on the 15th of May, 1997 from Abdullah A. Rahman & Co., and my solicitor's letter dated on the 22nd of May, 1997 as exhibits marked as "R-3" and "R-4" respectively.

4. In the alternative I wish to state that there I did not agree to the imposition of the interest of 1.5% per month per annum as claimed by the Petitioner as well as to the late charges of RM5.00 per month which were stated in the Petitioner's Bankruptcy Notice (as exhibited herein as "R-2"). I enclose herewith a copy of the Agreement and the Petitioner's Application Form as exhibit marked "R-5".

5. In conclusion, since the amount of debt was incorrectly stated in the Petitioner's Bankruptcy Notice, it is my view that the said Notice which was served on me on the 22nd of September, 1996 was an invalid notice and the alleged act of bankruptcy which is the basis of the Creditor's Petition is equally an invalid act.

6. Therefore I humbly pray to this Honourable Court to dismiss the Petitioner's Bankruptcy Notice and Creditor's Petition with costs.

By way of a summons-in-chambers in encl. 17, filed in accordance with r. 18(1) of the Bankruptcy Rules 1969, the judgment debtor sought to stay and to set aside the creditor's petition in encl. 7 and for costs together with any order as the court deems fit and just. Enclosure 17 was supported by an affidavit deposed by the judgment debtor on 27 August 1997 which was filed on the same date as reflected in encl. 16. The tenor of encl. 16 followed closely the contents of the affidavit in encl. 19. A further affidavit affirmed by the judgment debtor on 9 September 1997 as reflected in encl. 17A was also filed in support of encl. 17. In encl. 17A, the judgment debtor challenged the debt of RM28,733.23 that was said to be due to the petitioning creditor which the judgment debtor incurred as a result of the excessive use of the Visa credit card. It was the judgment debtor's stand that his credit entitlement or limit to the Visa credit card was in the region of between RM3,000 to RM5,000 and, consequently, it was totally untrue that he had run up the bill up to a figure of RM28,733.23. Moreover, the judgment debtor alleged that he was not served the statement of accounts nor with the notice of demand pertaining to that amount. The judgment debtor also alleged that he was not served with the order of the High Court, Kota Kinabalu and neither was a copy of that order enclosed in the bankruptcy notice taken out by the petitioning creditor. It was the judgment debtor's stand that he was not aware of the petitioning creditor's claim until he was served with the bankruptcy notice on 22 September 1996. Flowing from this, it was deposed that the act of bankruptcy that occurred on 1 October 1996 was null and void and wrong in law as the period for execution had ended on 29 September 1996. The judgment debtor verily believed that at the material time he did not commit an act of bankruptcy and, consequently, it was said that the creditor's petition was wrong in law and should be set aside forthwith. It was deposed that the judgment in default of appearance that was obtained against the judgment debtor was not a final judgment within the meaning of s. 3 of the Bankruptcy Act 1967. Finally, it was deposed that copies of the bankruptcy notice or creditor's petition had not been served personally to the judgment debtor in accordance to law. The sting of the allegations in encls. 16 and 17A would be dependent on the question of the validity of encl. 17 of which I have more to say in a moment.

Enclosure 17 was heard by the senior assistant registrar ("SAR") who, on 4 December 1997, dismissed it forthwith. Being aggrieved the judgment debtor appealed to the judge-in-chambers as reflected in encl. 24.

Before me, Mr. Mohd. Najib bin Omar, the learned counsel for the petitioning creditor, raised three preliminary objections and I shall now proceed to deal with them not in its order of priority.

Whether The Procedure Adopted In Encl. 17 Was Correct?

Enclosure 17 was filed by way of a summons-in-chambers aimed principally to stay and set aside the creditor's petition in encl. 7. Rule 18 of the Bankruptcy Rules 1969 reads as follows:

> Except where these Rules or the Act otherwise provide, every application to the court shall, unless the Court otherwise directs, be made by motion supported by affidavit.

and it means that encl. 17 was incorrectly filed. This is the short answer to a simple question.

Be that as it may, there are three ways for the judgment debtor to challenge the bankruptcy proceedings. Firstly, within seven days of the service of the bankruptcy notice on him, he must file an affidavit setting out the counterclaim, set-off or cross-demand (s. 3(1)(i) of the Bankruptcy Act 1967 and r. 95 of the Bankruptcy Rules 1969). Secondly, he must if he intends to dispute the sum stated in the bankruptcy notice as the amount due, give notice, by way of an affidavit, within seven days from receipt of the bankruptcy notice (s. 3(2) proviso (ii) of the Bankruptcy Act 1967 and r. 95 of the Bankruptcy Rules 1969). Thirdly, if he intends to object to the bankruptcy notice that was served on him on grounds other than that as stated above he must do so by way of a motion and, consequently, the stringent seven day rule does not apply. The bankruptcy notice in the present appeal was served on the judgment debtor on 22 September 1996 and calculation wise seven days thereafter would end on 29 September 1996, a Sunday, and consequently the following Monday 30 September 1996 would be the last day. But on that day the judgment debtor did not take any positive step to challenge the bankruptcy proceedings. It was only on 15 April 1997 that the judgment debtor proceeded to file a "Notice By Debtor Of Intention To Oppose Petition" as reflected in encl. 21 and as adverted to in the early part of this judgment. As I said it was only on 27 August 1997 that the judgment debtor filed encl. 17 way out of time and also by way of a wrong procedure. The procedural defect in encl. 17 cut into the very rubric of the judgment debtor's right of challenge.

In *Development & Commercial Bank Berhad v. Datuk Ong Kian Seng @ Ong Kin Cheang* [1995] 3 CLJ 307 FC, Mohamed Dzaiddin bin Hj. Abdullah FCJ had this to say of rr. 117 and 18 of the Bankruptcy Rules 1969 which must surely apply to the factual matrix of the present appeal (see p. 313 of the judgment):

> Rule 117 provides that where a debtor intends to show cause against a petition, he shall file a notice specifying the statements in the petition which he intends to deny or dispute. The contents of the notice can be found in Form 16 of the rules wherein it must be stated that he intends to oppose the making of the receiving order as prayed and that he intends either to dispute the petitioning creditor's debt or the act of bankruptcy or as the case may be. Rule 18 of the Rules further provides that except where the rules or the Act provide, every application shall, unless the Court otherwise directs, be made by motion supported by an affidavit. In *Datuk Lim Kheng Kim v. Malayan Banking Bhd* [1993] 2 MLJ 298, the Supreme Court held that failure to follow rule 18, which requires an application to be made by motion supported by affidavit, renders an affidavit in opposition ineffective and bad in law because unless the court otherwise directs, challenges to the creditor's petition or bankruptcy notice other than that the debtor has a counterclaim, set-off or cross-demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an affidavit. This Court has no reason to disagree with the decision and will follow it. Accordingly, in our view, the respondent's affidavit in opposition cannot be substituted as a notice to show cause against the creditor's petition to challenge the validity of the bankruptcy notice.

I too am bound by the decisions of the Supreme Court in *Datuk Lim Kheng Kim (supra)* and that of the Federal Court in *Development and Commercial Bank Berhad (supra).*

Incidentally, there is a passage appearing in the judgment of Mohamed Dzaiddin bin Haji Abdullah FCJ, in *Development & Commercial Bank Berhad (supra)* that merits reproduction and it is worded, at p. 313 lines "b" to "d" of the judgment, as follows:

> On the second ground, Counsel maintained that since no notice of the excess amount was given under section 3 (2) proviso (ii), the amount specified in the bankruptcy notice must be accepted to be correct. In the circumstances of this case, the bankruptcy notice was in accordance with the consent order. Section 3 (2) proviso (ii) provides that a bankruptcy notice shall not be invalidated by reason that the amount specified in the notice was in excess of the judgment sum unless the debtor within the time prescribed in the bankruptcy notice disputed the validity of the notice, on the ground of such mistake.

and when applied to the facts of the present appeal, the judgment debtor failed to challenge the validity of the bankruptcy notice in encl. 3 within the prescribed time of seven days.

Since I have held that encl. 17 was incorrectly filed, there was thus no necessity to deal with the various allegations mounted by the judgment debtor in the affidavit as reflected in encl. 16 and the further affidavit as seen in encl. 17A. The sting of encls. 16 and 17A depended largely on whether the procedure adopted in filing encl. 17 was in accordance to the law.

Whether The Judgment In Default Of Appearance Against The Judgment Debtor Issued By The High Court, Kota Kinabalu, Sabah Was Irregularly Obtained?

Can I go behind the judgment so as to rule it to be irregular? Mr. T. Rajasekaran, the learned counsel for the judgment debtor, argued that the judgment in default of appearance carried with it an interest rate which was higher than that allowed under O. 42 r. 12 of the RHC. That Order is worded thus:

> Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs (unless the rate has been otherwise agreed upon between the parties), such interest to be calculated from the date of judgment until the judgment is satisfied.

It is germane to highlight the relevant parts of that judgment in default. It was worded thus:

> ... plus agreed interest at 1 1/2% per mensem per annum from the 1st of July till date of payment, late charges of $5.00 per month and agreed legal fees of $2,873.00 and costs of $225.00.

and clearly it can be seen that the interest and the legal fees had been agreed upon by the parties. But the amendment of r. 12 of O. 42 of the RHC which allows parties to agree to a higher rate only came into effect and became effective on 12 December 1986 which was after the judgment in default of appearance was obtained. I am in agreement with the argument that interest after judgment should not exceed 8% per annum (*Supreme Finance (M) Bhd v. Koo Sin Ken* [1987] 1 CLJ 374; [1987] 1 MLJ 296) but the judgment in default of appearance emanating from the High Court of Kota Kinabalu, Sabah listed the interest at a paltry sum of 1½% per mensem per annum of which the judgment debtor should be happy and contented with. However, when computing the interest in its entirety the amount far exceeded the judgment sum as can seen in encl. 3 which has been reproduced in the early part of this judgment. This was the major complaint of Mr. T. Rajasekaran. The case of *Hughes v. Justin* [1894] 1 QB 667 lays down the principle that if the

plaintiff enters judgment in default for more than the sum actually due, the defendant is said to be entitled to have the judgment set aside *ex debito justitiae.* And flowing from that it is said that bankruptcy proceedings instituted upon such a judgment are bad and this is so even though the bankruptcy notice was for the correct amount (*Muir v. Jenks & Co* [1913] 2 KB 412 CA). It is also said that a judgment irregularly obtained will be set aside independently of the question of merits: *Anlaby v. Praetorius* [1888] 20 QBD 764. It is interesting to note that in the case of *Armitage v. Parsons* [1908] 2 KB 410 where the error in the judgment was very slight and the court magnanimously on the application of the plaintiff treated it as a slip and amended the judgment. Order 20 r. 11 of the RHC is in the same vein and it is worded as follows:

> Clerical mistakes in judgment or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by summons without an appeal.

These are the guiding principles but the question to be resolved is this: Am I empowered to go behind the judgment? For this exercise, I need to refer to some authorities.

In *Re Lennox, ex parte Lennox* [1885] 16 QBD 315 it was held that:

> The court of bankruptcy has power to go behind a judgment and inquire into the consideration for the judgment debt, not only at the instance of the trustee in the bankruptcy of the debtor upon the question of the proof of the debt, but also at the instance of the judgment debtor himself upon the hearing of a petition by the judgment creditor for a receiving order, even though the debtor has consented to the judgment; and, if on the hearing of the petition facts are alleged by the debtor, of which evidence is tendered, and which, if proved, would show that, notwithstanding the judgment, there is, by reason of fraud or otherwise, no real debt, the court ought not to make a receiving order without first inquiring into the truth of the debtor's allegations.

In *Re Flatau, ex p Scotch Whisky Distillers Ltd* [1889] 22 QBD 83, the judgment of the court was as follows:

> The court of bankruptcy will not, as a matter of course, inquire into the validity of a judgment debt, but only when there is evidence that the judgment has been obtained by fraud or collusion, or that there has been some miscarriage of justice.

In *Sovereign General Insurance Sdn Bhd v. Koh Tian Bee* [1988] 1 MLJ 304, Lee Hun Hoe CJ (Borneo) (as he then was) speaking for the then Supreme Court said at p. 305:

An irregularity or formal defect in the judgment is no sufficient reason for going behind it: Re Beauchamp [1904] 1 KB 572. As a general principle, the validity of the judgment debt will only be inquired into when there is evidence of fraud or collusion or miscarriage of justice: *Re Flatau* [1889] 22 QBD 83; *Re Howell* [1915] 84 LJKB 1399.

Applying these authorities, three observations must be made in the context of the present appeal. Firstly, there was no allegation of fraud or collusion. Secondly, there was a feeble complaint in regard to the judgment sum by merely saying that the judgment debtor credit limit for usage of the Visa credit card was between RM3,000 to RM5,000 without particularising in great detail. Thirdly, the only complaint advanced on behalf of the judgment debtor was in regard to the rate of interest awarded by the High Court of Kota Kinabalu. One thing for sure would be this. The judgment debtor has to pay more in the form of interest when compared to the judgment sum. The petitioning creditor too would be entitled to use the judgment emanating from the High Court of Kota Kinabalu to found the bankruptcy proceedings against the judgment debtor. At this juncture, I must weigh judicially "the ends of justice" (*Soh Bok Yew v. Cindee Developments Sdn Bhd* [1977] 1 MLJ 242) and having done so, I ruled as follows:

(1) The petitioning creditor was entitled to use the judgment from the High Court, Kota Kinabalu to found bankruptcy proceedings against the judgment debtor notwithstanding that the interest after judgment that was awarded as reflected in encl. 3 was more than it should be.

(2) The excess amount must be reduced accordingly by the official assignee at a later stage, if and when a receiving and adjudication order was made.

This was my judgment and I so hold accordingly.

Lack Of Bona fide On The Judgment Debtor's Part

The judgment in default of appearance was handed down by the High Court of Kota Kinabalu, Sabah on 29 September 1984, some 14 years ago. No steps were taken by the judgment debtor to set aside that judgment. As can be seen from the recital of the facts, the judgment debtor played possum and did not take any action after the bankruptcy notice was served on him on 22 September 1996. The first sign of activity on the judgment debtor's part was only on 15 April 1997 when he filed the notice of intention to oppose the petition.

In *Wee Choo Keong v. MBF Holdings Bhd & Anor And Another Appeal* [1993] 2 MLJ 217 SC, Tun Hamid Omar LP had this to say on obedience to court order:

> It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences.

The judgment debtor here clearly was in breach of the order of the High Court, Kota Kinabalu as he failed to obey that order and he runs the risk of being cited for contempt. This clearly had a bearing on the bona fide of the judgment debtor in filing encl. 17.

Re Mat Sari bin Hamid, Ex Parte United Asian Bank Bhd [1993] 1 CLJ 202 was a case where the debtor applied for an adjournment of the hearing of the creditor's petition on the ground that an application had been made to set aside the judgment in default which had been obtained and on which the bankruptcy proceedings had been founded. The petitioning creditor objected to the application on the ground that the judgment in default had been obtained after the writ of summons had been served personally on the debtor. Further, more than four years had elapsed since the judgment in default had been entered and more than four months had passed since service of the bankruptcy notice whereas the application to set aside the judgment was only made the day before the hearing of the petition. The court rightly held that the debtor's application was an attempt to delay the making of the orders sought by the petitioner and bereft of *bona fides* on the part of the debtor, which did not justify an adjournment of the proceedings. Now, in the present appeal there was no application made whatsoever by the judgment debtor to set aside the judgment in default of appearance that was made by the High Court, Kota Kinabalu on 29 September 1984 and the filing of encl. 17 on 27 August 1997 – some 12 years 10 months 28 days late, smacked of lack of *bona fide* on the part of the judgment debtor.

For the reasons adumbrated above, I upheld the preliminary objections in favour of the petitioning creditor. This meant that the appeal in encl. 24 must be dismissed with costs forthwith.